HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

AS.No. 1117 of 1998

JUDGMENT:

This is an appeal filed against the judgment and decree passed by the Senior Civil Judge, Kovvur on 30.04.1998 in O.S.No.25 of 1993.

Since this is a first appeal, the parties are arrayed as they are in the lower Court itself. The legal representatives are added during the appeal in this Court as first plaintiff died.

The suit was filed in the lower Court by one N.Kondamma against her husband N.Pullaiah and others. She later died. The case of the deceased-plaintiff in the lower Court is that she is the wife of N.Pullaiah and that they have been residing separately from each other due to differences in their marriage. The deceased-plaintiff states that her husband kicked her out and on 05.09.1970 he made a tentative arrangement by executing a gift settlement deed in her favour by registering an extent of Ac.1.00 cents of wet land. The deceased-plaintiff states that she had been requesting her husband for further assistance and maintenance, but he was not heeding her requests. According to her, the first defendant executed a nominal document on 29.08.1982 in favour of 13th defendant, which she claims is collusive and nominal. Thereafter, she filed a case for maintenance in O.P.No.4 of 1998, but as the same was likely to fail, she took the permission of the Court and withdrew the same. She also learnt that the first defendant executed a registered sale deed in respect of items 1 and 2 of plaint schedule property in favour of defendants 1 to 4 a couple of years back to defeat her right of maintenance. The said transactions are gratuitous transactions meant to defeat her claim. The plaintiff also learnt that defendants 1 to 4 laid out the plaint schedule property into house sites and sold them to defendants of 5 to 12. She also states that the said transactions are gratuitous, illegal invalid and not binding and also states that she is entitled to claim charge over plaint-A schedule property. Later, after the suit was filed, the husband of the plaintiff died intestate and the plaintiff, therefore, claims a declaration of her title to the plaint-A schedule properties and recovery of the same.

Second defendant filed a written statement denying the entire plaint and stating that the settlement deed executed by first defendant in favour of the plaintiff on 05.09.1970 is a valid document and is not a tentative arrangement at all. The second defendant also goes on to allege that the first defendant only owned Acs.2.25 cents out of other Acs.5.74 cents and that he executed a registered sale deed on 21.11.1983 in favour of defendants 2 to 4. The suit that is filed after seven years is not a validly instituted suit and is barred by limitation. This defendant also states that by the date of the suit, the first defendant did not have any property as he validly conveyed the same to the defendants 2 to 4. The defendant also states that the subsequent transfers made in favour of other defendants are all valid transfers and therefore, plaintiff cannot file the present suit.

The fifth defendant filed a written statement stating that he obtained his sale deed for plot No.22 for a valid consideration under a sale deed dated 18.02.1988 and that he is a *bona fide* purchaser without the notice of the plaintiff's claim.

The sixth defendant filed a written statement stating that he purchased a plot under a sale deed dated 07.12.1987 and he has been in possession and enjoyment of the same as a genuine *bona fide* purchaser. He also urged that the plaintiff's right to require maintenance is a right in personam and does not extend to property, which has alienated prior to the death of the deceased-first defendant.

Defendants 7, 8, 9, 10 and 11 filed similar written statements. Defendant No.12 filed a separate written statement stating that she also is a purchaser for value without notice of any pre-existing claims and that therefore, the sale in her favour cannot be set aside. Based on this, the lower Court framed the following issues:

(i) Whether the settlement deed dated 05.09.1970 executed by defendant No.1 in favour of the plaintiff is by way of tentative arrangement?

(ii) whether the sale deed executed by first defendant in favour of defendant No.13 on 29.08.1989 is a nominal sale deed?

(iii) whether the sale deeds executed by first defendant in favour of defendants 2 to 4 are gratuitous and are not binding on the plaint?

(iv) whether defendants 5 to 13 (D.12) are *bona fide* purchasers?

(v) whether the petitioner's right of maintenance against first defendant as a right in personam or whether she got such right against the properties also?

(vi) whether the plaintiff is entitled to the declaration of her title and for recovery of possession of the plaint schedule properties?

(vii) To what relief ?

On behalf of the plaintiff, PWs.1 to 5 were examined and Exs.A.1 to A.8 were marked, which are the reply lawyer notice and un-served postal covers. On behalf of the defendants, DWs.1 to 6 were examined and Exs.B.1 to B.12 were marked.

The case went to trial and by a judgment and decree dated 30.04.1998, the suit was decreed in favour of the plaintiff and the defendants were directed to put the plaintiff in possession of the property. It is this judgment that is now impugned in the appeal.

Heard Sri M.V.Suresh Kumar, Sri Srinivasa Rao Velivela and Sri Sateesh Kumar Eerla learned counsel for the appellants and Sri C.Subodh, learned counsel for the respondents.

At the outset, it is important to mention that the records of the lower Court are missing in this case and it is established after a detailed enquiry that the following are available: (1) the written statement of defendants 2, 5, 6, 7, 8, 9, 10 and 12. (2) Exs.B.4, B.6, B.10 and 11 and (3) the certified copy of the depositions of PWs.1 to 5 and DWs.1 to 6 are available. Other documents are not available. It appears that after a detailed search, these records were traced as can be seen from the case file ending with the letter dated 09.08.2017 of the Senior Civil Judge, Kovvur.

As all the original documents in the suit are not available, the arguments proceeded on the basis of the depositions of the witnesses and documents that are available. Both the learned counsel relied upon the judgment; depositions and pointed out their version of the case. Therefore, this appeal proceeded on this basis with the consent of the parties. A paper book was also filed by the appellants with some papers.

The first issue framed is, whether the settlement deed dated 05.09.1970 executed by first defendant in favour of the first plaintiff is by way of a tentative arrangement.

Issues 2 and 3 are whether the sale deeds executed by first defendant in favour of the other defendants are (a) nominal and (b) gratuitous.

Before embarking on these difficult issues of deciding the validity of this document without the main document i.e. Ex.B.1 dated 05.09.1970, this Court is emphasising two important issues on burden of proof. (a) the person, who challenges the document should plead and prove with certainty that the contents of the document are not correct. (b) the plaintiff who alleges that the contents of a document are not correct can introduce oral evidence subject to the provisions of Section 92 of the Indian Evidence Act, to disprove the contents of a written document by bringing her case within the exceptions provided in Section 92.

The plaint in OS.No.25 of 1993 are in the paper book filed. The record dispatched by the lower Court shows that what is available is a plaint of December 1987, which is the pleading in OP.No.4 of 1998. It is important to note, as pointed out by the appellant that in this OP, the plaintiff did not challenge the deed executed on 05.09.1970, which she now claims is a provisional arrangement only. She only challenged the sale deed dated 29.08.1982 executed in favour of 12th defendant.

The written statements of the defendants are available. It is a fundamental principle of law that requires no further elucidation that the burden of proof is on the person, who alleges that the document is not valid. There is a further presumption that a document that is validly registered is validly executed. The learned counsel for the appellant also cited the judgment in the case of ***Prem Singh and Others v. Birbal and others***[1], wherein the Hon'ble Supreme Court clearly reiterated the principle that there is a presumption that a registered document is validly executed. The onus of proof would be on a person, who leads evidence to rebut the presumption. Under Order VI, Rule 4 of CPC also the pleadings on this issue should be clear. Irregular conduct etc., should be clearly and categorically pleaded and proved. The plaint in O.S.No.25 of 1993 available with the paper book does not contain clear pleadings with requisite particulars.

The deposition of PW.1, who is the main protagonist, which is available in this case is also as follows:

> "Then deceased-D.1 executed a registered settlement deed in favour of me for an extent of Ac.1.00 of wet land on 05.09.1970 and the settlement deed is only a temporary relief and I have not relinquished my future rights. Later, I demanded for other properties, but the deceased-D.1 postponed with one pretext or another. So, I filed OP.No.4 of 1988 for maintenance on the file of District Munsif's Court, Atmakur."

The reading of the plaint/petition in the earlier OP, a xerox copy of which is available in the record sent shows that she did not allege anything about this 05.09.1970 deed in the earlier OP filed by her challenging the sale made to 12th defendant. This was a case filed for maintenance and for

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[1] 2006 (5) SCC 353

creating a charge over the property sold to S.Tirupamma, who is the second respondent in the OP and is 12th defendant in the present suit. If the endeavour of N.Kondamma, the present first plaintiff, was to claim maintenance over and above what was granted to her in the year 1970, she should have attacked the deed in 1987 when she filed the first OP. She should have pleaded in that case also that the 1970 deed executed in her favour by her husband is only a temporary arrangement. Even otherwise, she should have pleaded and sought a charge on the entire estate of her husband and not merely on the property sold to S.Tirupamma, the 12th defendant. In addition, in her evidence, she merely states that the deceased-first defendant executed a registered settlement deed on 05.09.1970 and that she has not relinquished her future rights. Beyond this, there is no other evidence from her side.

The learned Judge in the lower Court, while deciding this issue, held that the deed is a temporary arrangement. At page 28 of the typed certified copy of the judgement, the learned Judge extracted a few lines in Telugu and states that the settlement deed does not mention that it is a permanent settlement or permanent alimony and that therefore, it is a temporary arrangement only. This finding is strongly attacked by the learned counsel for the appellants, who states that such a presumption cannot be drawn on the basis of a mere statement in the document. He states that the document does not mention whether it is permanent or temporary. Therefore, burden was on the plaintiff to prove that the terms of a document do not really set out what is mentioned therein. For this, the learned counsel submits that the evidence should prove that the arrangement was a temporary arrangement. He also pointed out that the finding of the lower Court that plaintiff and defendant are living separately is not borne out by Ex.B.1 is not correct. The learned counsel pointed out that the evidence of the witness itself reveals that there were series of litigations between the plaintiff and her husband/ his family. He also points out that if the plaintiff was necked out of her husband's house, she could have filed an application for restitution of conjugal rights etc. The cross-examination of the witness also reveals that she was living separately from her husband. Therefore, learned counsel points out that from 1970 till the date of filing of this case in 1989, the plaintiff and her husband were not living together as is clear from the record.

In these circumstances, the learned counsel points out that the execution of the registered deed of settlement in 1970 was only with a view to provide maintenance to her and for no other reason. If this deed was not correct and the plaintiff felt she is entitled to more maintenance, she could have claimed the same earlier on, but from 1970 till 1989 (when the present case was filed), she did not do anything to claim maintenance from her husband. Even if the earlier OP filed in 1987 is taken into consideration, it is clear that 17 years have elapsed from the date of the execution of the settlement deed in her favour. Therefore, the appellants' counsel urges that this litigation is a clearly motivated litigation and the lower Court erred in holding that the deed of 1970 is only a temporary arrangement. Therefore, the finding on issue No.1 is wrong according to the learned counsel for the appellants. This Court also finds strength and force in this submission. The document of 1970 is not available on the file. The pleading in this case is not very clear about tentative arrangements. The petition in the earlier OP shows clearly that the plaintiff did not attack the present Ex.B.1, which is dated 05.09.1970 in that earlier OP.

The evidence available is the chief-examination of PW.1, which does fit within the exceptions provided in Section 92 of the Indian Evidence Act, which provides that in certain cases oral evidence can be given against the contents of a written document.

Therefore, this Court holds that the evidence that is available is not sufficient to hold that the Ex.B.1 deed is only a tentative arrangement. The finding on this issue is, therefore, reversed.

The next issue that falls for consideration is, whether the sale deed executed by first defendant in favour of defendants 2 to 4 are "gratuitous" and not binding. This issue was considered next in the lower Court and therefore, this issue is considered in the same order. Ex.B.4 is a sale deed dated 21.11.1983. This sale deed is attacked by the plaintiff on the ground that it is a gratuitous transaction. However, as pointed out by the learned counsel for the appellants, the pleading as reproduced in page 4 is relevant. While discussing the earlier OP.No.4 of 1988, the plaintiff states as follows: "pending the above OP, the plaintiff learnt that the first defendant executed registered sale deed a couple of years back in respect of items 1 and 2 of the plaint-A schedule land in favour of defendants 2 to 4 to defeat her rights". Thus, the learned counsel points out is a clear admission that during the pendency of the earlier OP itself, she was aware of the transactions. Therefore, according to the learned counsel for the appellant, the present challenge is barred by limitation. As per Article 59 of the Limitation Act, the right to challenge a document arises when the party has knowledge of the contents of the document and in this case, as can be seen from the pleading that pending the above OP itself the plaintiff learnt that first defendant executed a sale deed in favour of defendants 2 to 4. The earlier OP was filed in 1987 and was withdrawn in 1989. If by this time, the plaintiff was aware of the existence of these documents, she should have taken steps to get the same cancelled etc. Therefore, this Court finds that the challenge to the sale deed of 1983 (Ex.B.4) by this case of the year 1993 (filed on 24.10.1989) is hopelessly barred by time. Alternatively, also this Court finds sufficient force in the contention of the learned counsel for the appellant that a bald pleading that the sale deed executed in favour of defendants 1 to 4 is gratuitous is not enough to set aside the same. The word gratuitous means it is either done without a good reason or was given or done free of charge. Assuming that the challenge to the sale deed Ex.B.4 is that it was without consideration, then the onus was on the plaintiff to clearly prove the same; since it is evidence which is being given against a registered sale deed. In her chief-examination, she merely states that there was exchange of legal notices in the year 1985 and later she learned that the first defendant sold items 1 and 2 of plaint-A schedule property to defendants 2 to 4 who are his nephews. She states that these documents are created by first dependent in collusion with defendants 1 to 4 so as to avoid maintenance. There is no statement in her evidence that the sales are "gratuitous". Gratuitous sales are different from collusive sales. The pleading is to the effect that sale is gratuitous, but the evidence is of a collusive sale. This evidence, in the opinion of the Court is not sufficient to hold that the sale made by first defendant in favour of defendants 2 to 4 is not correct or is gratuitous or otherwise invalid.

As mentioned in the judgment of ***Prem Singh's (1 supra)***, the Hon'ble Supreme Court held that a presumption arises that a registered document is validly executed. The onus of proof would be on a person who challenges the document. In this case, there is absolutely no evidence to show that the sale deed was executed gratitiously.

Even if the document was executed without consideration, the law is clear on this subject that passage of consideration is not a necessary criteria for the validity of a sale. If the sale consideration did not pass the seller will have a lien on the property, but that does not mean that the sale by itself is invalid. The learned counsel rightly relied on the judgment of the Hon'ble Supreme Court of India in ***Kaliaperumal v. Rajagopal and another***[2] for his argument on this point. Even otherwise, the question that arises for consideration is whether a third party can question of sale deed on the ground of lack of passage of consideration. The Hon'ble Supreme Court of India in the case reported in ***Muddasani Venkata Narasaiah (D) Th.Lrs. v. Muddasani Sarojini***[3], has held that a third party cannot question a sale deed stating that no consideration has passed.

The judgment of the Supreme Court of India cited above, is also applicable to the present situation and the Supreme Court clearly held that passage of consideration and transfer of ownership are matters to be decided on the basis of evidence and on the basis of pleading and proof, namely the intention of the parties. When the recitals of a document are insufficient or ambiguous the surrounding circumstances could be looked into. In this case, the photostat copy of

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[2] (2009) 4 SCC 193

[3] (2016) 12 SCC 288

Ex.B.4, which is dated 21.11.1983, is available. It shows that the sale consideration of Rs.3,000/- has been received completely on the date of execution of the sale deed. It is also mentioned in the sale deed that the possession of the property has been handed over by the vendor namely N.Pullaiah to defendants 2 to 4. The chief-examination of the witness (PW.1) is absolutely silent about the matter of sale consideration and/or of the passage of title. Apart from the silence on the part of the plaintiff, DW.1 who is second defendant in the suit also deposed that Ac.2.20 cents of land was purchased by him and his own brother on 21.11.1983. He further goes on to assert "the plaintiff knew about the sale transaction under Ex.B.4 and earlier sale transaction regarding wet land. Both prior to Ex.B.4 and after Ex.B.4, the plaintiff did not raise her little finger at any point of time." Later, he states that he sold the land as house plots to others for valid consideration. This open assertion of DW.1 in his chief-examination is not at all touched upon in the cross-examination. A reading of the cross-examination as is available in the records shows that there is absolutely no question in the entire cross-examination about Ex.B.4. The learned counsel for the appellant pointed out that failure to cross-examine amounts to an acceptance of the version set up by the opposite side. The learned counsel relied upon ***Muddasani Venkata Narasaiah's*** case (3 supra), wherein Supreme Court held that failure to cross-examine is a clear acceptance of the case advanced by the witness. In this case, admittedly there is no cross-examination about the contents of Ex.B.4. Even in the chief-examination of the plaintiff herself, she did not depose anything about the contents of Ex.B.4. The learned counsel is right in his submission on these points.

At the end of page 34 and in page 35, the lower Court held that there is no iota of evidence to prove the genuineness of Ex.B.4. The burden of proof is on a person, who disputes the contents of the document. The burden of proof to set aside a registered document is all the more on a person, who disputes the contents of the document. In this case, the plaintiff is disputing the contents of Ex.B.4. Therefore, the burden of proof to disprove the contents of Ex.B.4 or to prove that it is not a genuine transaction lies squarely upon the plaintiff. This burden has not been discharged by her. Yet the lower Court agreed with her contentions. ***Prem Singh's*** case (1 supra) is squarely applicable here also, but the lower Court decided the issue without any evidence at all.

The learned Judge also held strangely that the non-examination of the attestors and the scribe of Ex.B.4 leads to the conclusion that the said Ex.B.4 is a nominal document. This finding is also totally contrary to the law of the land. It is true that mere marking of a document is not proof of contents of a document. But this proposition is true, when the execution of the documents, contents of the documents etc., itself are in dispute. Similarly, as per the exceptions to Section 92 of Indian Evidence Act, evidence can be let in to disprove the contents of a document when it is the case of the attacking party that the document does not reflect the true nature of the transaction. This is not the case in the present suit. The execution of the document is not denied. The signatures or the registration are not denied. What is stated that it is a 'gratuitous' transaction to defeat a claim for maintenance, nothing more and nothing less. Therefore, in this case, the lower Court was clearly in error in holding that scribe and attesting witnesses are to be examined. Even otherwise, there is no suggestion in the cross-examination of DW.1 that Ex.B.4 is a gratuitous document. There is no evidence on the part of the plaintiff on whom the burden of proof lies to show that it is a "gratuitous" document. Therefore, this Court is of the opinion that the lower Court committed a grave error in shifting the burden of proof and also in saying about the attestors and scribe are not examined. The finding on Ex.B.4, issue No.3 is thus, incorrect and is set aside.

Whether defendants 5 to 13 are *bona fide* purchasers is an issue that arises as a continuation of the finding of the previous issue. Defendants 5 to 13 are the purchasers of the plots of land from defendants 2 to 4. The written statement of defendant No.4 is not on record, but it appears that the same advocates appeared for the parties. Defendant No.2 has filed a written statement and was examined as DW.1. His oral evidence is available on record. He deposed while stating that defendants 2 and 4 are my own brothers and he later says we made the land purchased under Ex.B.4 into house sites and sold the same as house plot to various others. In his chief-examination, he states that the sales made to defendants 5 to 11 took place in the year 1987-88 and he marks the documents on behalf of the defendants. Exs.B.7 to B.12 are the sale deeds by which the land is transferred as house plots. The lower Court heavily relied on the fact that all the owners did not join in the execution of these documents. It is, however, important to note that there is no cross-examination on the issue that the three owners namely defendants 2, 3 and 4 did not join in the execution of the sale deeds. Similarly, defendants 3, 4, 5 and 6 deposed about their individual purchases. There is no cross-examination that defendant No.4-Penchala Narasimhulu did not join in the execution of the sale deeds. The learned trial Court Judge noticed that only Ramanaiah and Subbaiah have signed the sale deeds. When the sale deed that was filed was accepted as valid by the parties, who purchased the same and the party who challenges the same did not raise the issue, the Court should not have embarked on this elaborate enquiry. Even if the third brother did not sign the sale deed, it would not invalidate the entire sale deed and at best, a 1/3rd share can be said to be not validly transferred. For the other 2/3rd, the brothers have title. Similarly, the finding of the lower Court that a lay out plan was not filed to show whether the lay out was approved or not is also clearly an erroneous finding. A lay out plan does not affect the title. Lay outs are to be prepared under the relevant law to ensure that the development of the land takes place according to the law relating to the development and sale of properties. For this purpose, the approving authority for the lay out decides on the size of the plot, the roads, drainage, public utilities etc., that are to be provided in the lay out. This is to ensure systematic and planned development. But this does not in any way affect the "title". The title to the property can only be passed through validly registered documents or otherwise. Thus, the non filing of the lay out plan cannot be held to be a factor in deciding the title. Therefore, the available evidence clearly leads to the conclusion that the sales made to defendants 5 to 13 are valid. There is nothing contrary in the evidence to show that defendants 5 to 13 are not *bona fide* purchasers for value.

Issue No.2: whether the sale deed executed by first defendant in favour of 12th defendant is a nominal sale deed.

As per the pleading, the first defendant executed a nominal document dated 29.09.1982 in favour of the 12th defendant. This document is the subject matter of the challenge in the first O.P. filed on the file of the District Munsif, Atmakur. In that case, she added S.Tirupamma as second defendant. In the present suit also Tirupamma is shown as 12th defendant and the issue is whether the sale deed executed by first defendant in favour of defendant No.13/defendant No.12 on 29.09.1982 is a nominal sale deed.

In para 21 at page 43 of judgment, the learned Judge goes on to decide about the validity of the sale deed executed by the first defendant. The learned counsel for the appellant is right in pointing out that the said sale deed dated 29.08.1982 is not a part of the lower Court's record at all. The appendix of evidence does not contain an exhibit bearing the date 29.09.1982 at all. Therefore, in the absence of any document, the lower Court could not have gone into the merits or demerits of the said document. The lower Court strangely held that the party concerned with the document is not examined before the Court nor did she prove the contents of the document, and concluded that the document dated 29.08.1982 is a nominal sale deed. (There is an obvious typographical error about the date of the deed in the impugned judgment and both counsels agreed that the deed is dated 29.08.1982 only).

This Court is unable to understand on what basis the lower Court came to the conclusion that the document dated 29.08.1982 is not a valid document. It is the plaintiff, who has urged that the sale deed executed in favour of 12th defendant is not valid, but she has not filed the said document. Yet, the Court proceeded to hold the issue against the defendants. Even a reading of the chief-examination of PW.1, who is the main protagonist, goes to show that she did not depose about the sale deed at all. Therefore, the question of the said sale deed being set aside as invalid and nominal is absolutely incorrect. The finding on Issue No.2 is also reversed.

Issue Nos.5 and 6: These two issues have been decided together. If the husband does not maintain his wife and provide her maintenance, she is entitled to seek a "charge" on the property or she may enforce it again the purchaser. This is both as per Section 39 of the Transfer of Property Act, 1882 and Section 28 of the Hindu Adoption and Maintenance Act.

The right that is given to a wife who is entitled to maintenance is to get a charge on the property for maintenance. By creating a charge on the property, the Court is not granting a decree of "declaration of title". It only is an enforceable right which will fructify by way of sale of the property with a charge. Section 100 of the Transfer of Property Act, 1882 governs the situation. In this case the learned counsel is right in contending that there is no determination of maintenance or creation of a charge. This prayer was given up by an amendment.

As far as the plaintiff's right to seek declaration of title and recovery of possession after the death of a husband pending the litigation is concerned, the plaintiff would have this right to seek declaration of her title if her husband had any subsisting right in the property by the date of his death. It is clear that by the date of his death, the plaintiff's husband did not have any rights in the property. His rights were conveyed/transferred to defendants 2 to 4 and to the 12th defendant long prior to the institution of the proceedings itself. As those sales are held to be valid and are for valid consideration, this Court is of the opinion that the plaintiff's husband/first defendant did not have any subsisting right in the property as on the date of his death. Consequently, after his death, the plaintiff also does not have a right to seek a declaration.

For both the reasons, this Court holds that the prayer in this suit is bad. The plaintiff is not entitled to any relief whatsoever.

For all the reasons recorded in the judgment, this Court has no hesitation in holding that the impugned judgment is bad in fact and in law. This appeal, is, therefore, allowed and the findings of the lower Court are set aside. No order as to costs.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 05.01.2018
KLP